

**Before the
Federal Communications Commission
Washington, DC**

In the Matter of)	
)	
Request for Waiver in connection with)	
the Universal Service Administrator's)	
Demand for Payment by)	
)	
El Paso Independent School District)	File Nos. SLD- 256606
El Paso, Texas)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

REQUEST FOR WAIVER

El Paso Independent School District ("School District"), by its representative, hereby requests that the Commission waive its rules and release the School District from its joint liability in connection with FRN 648960, because the School District has already repaid its fifty percent share of the \$843,574 debt that IBM Corporation ("IBM") and the School District jointly owe. Alternatively, the School District requests that the Commission instruct the Administrator ("USAC") to (a) suspend any further collection activity against the School District; (b) demand that IBM pay its \$421,787 share of the parties' joint debt; and (c) resume collection activities against the School District *only if and when* the Commission has exhausted all of its administrative and legal enforcement options against IBM, and it still cannot collect the \$421,787 that the corporation owes.

The School District paid back its \$421,787 share of the parties' joint liability in 2007. Thus equity, fairness, the public interest, and the E-rate program as a whole would best be served by either of the two remedies set forth above.

I. FACTS

In 2007, after a lengthy investigation, USAC ordered IBM to return more than \$18 million.¹ USAC ordered IBM and the School District together to pay back \$843,574 more.² The School District immediately paid its fifty percent share of the parties' joint liability, which came to \$421,787.³ Instead of paying its share, IBM appealed, and USAC suspended collection activities against both parties while the matter was pending before it.

On January 19, 2012, USAC ruled on IBM's appeal.⁴ Among many other things, USAC rejected IBM's argument that USAC had incorrectly decided the issue underlying IBM's and the School District's joint liability.

One week later, on January 26th, USAC surprised the School District with a Demand Payment Letter.⁵ Even though the School District had already paid its \$421,787 share of the parties' joint liability *and IBM had yet to pay anything*, USAC continued to demand full payment from the School District.

Representatives of the School District immediately contacted USAC officials to discuss the matter and to ask for assurance that USAC would look to IBM first for repayment. USAC replied that it could not release the School District from liability and advised the School District to file a waiver request with the Commission.

¹ See Exhibit 1, *Explanation of Commitment Adjustment Letters and Recovery of Improperly Disbursed Funds Further Letter to El Paso Independent School District and IBM Corporation*.

² *Id.* at pp.12-14 (FRN 648960).

³ See Exhibit 2, November 21, 2007 letter from the School District's superintendent to SLD President Mel Blackwell, and Exhibit 3, December 6, 2007 transmittal letter plus copy of the School District's check to USAC in the amount of \$421,787.50.

⁴ See Exhibit 4, *Administrator's Decision on Appeal – Funding Year 2001 – 2002*.

⁵ See Exhibit 5, *Demand Payment Letter*.

II. ISSUE

Where, as here, a service provider and an applicant are jointly liable for an E-rate debt to the Commission, the applicant has already paid back its half of the parties' joint liability, and the service provider clearly has the financial resources to repay its share but has yet to do so, whether the Commission should:

(a) waive its rules and release the applicant from liability for the balance due and continue its collection activities solely against the service provider; or

(b) instead of releasing the applicant from liability, instruct USAC to suspend any further collection activities against the applicant unless and until collection activities against the service provider have failed completely and the Commission has no legal options left.

III. DISCUSSION

A. WAIVER IS NECESSARY TO PREVENT AN UNJUST RESULT

The School District understands that it is jointly liable and appreciates the legal consequences that flow from that kind of liability. It does not now and never has disputed its legal responsibility in that regard. However, in 2007, when it paid half of the parties' joint liability, it reasonably assumed that USAC would look to IBM to repay the other half, since USAC had concluded that IBM was half to blame for the underlying rule violation.

That was a perfectly fair and reasonable expectation. While the School District does not contend that USAC ever gave it any firm assurance that it would go after IBM first for the balance due, it is interesting to note that USAC did nothing at that time to disabuse the School District of that notion, even though USAC knew or should have known that that was exactly what the School District expected USAC to do. No reasonable person, we submit, ever would expect USAC to go after a school or library

applicant for one hundred percent of a joint liability, where it is common knowledge, as it is here, that the service provider is perfectly capable of paying its fair share.

USAC has indicated that its hands are tied by the Commission's rules, and that it has no choice at this time but to demand repayment of the full \$843,574 debt from the School District. If indeed that is the case, and we have no reason to believe that it is not, then these particular and highly peculiar circumstances most assuredly warrant a waiver of the Commission's rules.⁶

IBM is one of the world's wealthiest corporations, and its prospects for the future look bright. For the fourth quarter of 2011, "the tech giant reported a profit of \$5.5 billion, an increase of 4% versus last year. Revenue for the quarter was \$29.5 billion, just short of the consensus forecast of \$29.7 billion from analysts surveyed by Thomson Reuters."⁷

The School District financial foundation is not nearly as solid. Even in the best of times, school districts routinely struggle to make ends meet. Today, things are worse than ever. These incredibly difficult economic times have forced the School District and other urban districts like it to cut their already meager budgets even closer to the bone.

IBM is not a thinly capitalized company with a suspect balance sheet that might not be able to repay what it owes to the Commission. It is just the opposite. In light of this economic reality, it does not make sense, economic or otherwise, to continue to hold the School District jointly liable for IBM's share of the parties' \$843,574 debt. Without a waiver, that joint liability will continue to hang over the School District's balance sheet like a dark black cloud until this matter is finally resolved, which could take years. This highly inequitable result could not possibly be what the Commission intended when it

⁶ The Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁷ See Exhibit 6, "IBM earnings top forecasts." *CNN Money* (January 19, 2012). http://money.cnn.com/2012/01/19/technology/IBM_earnings/index.htm

decided to allow USAC to hold applicants and service providers jointly liable for E-rate debts.

Nor could this result possibly be what Congress intended when it established the E-rate program. Congress designed the program to benefit schools, students, libraries, and library patrons -- not service providers. To require a school district to pay back 100% of an E-rate-related debt for which a service provider is 50% liable, especially where the service provider, like the one here, is a multi-national corporation with the wherewithal to pay, would turn the program upside down. If the FCC allows USAC to continue prosecuting the School District for 100% of the amount due on FRN 648960, it is going to punish the School District, its students and the taxpayers in the local community, while simultaneously delivering an unmerited and unexpected windfall to IBM

We concede that there could be circumstances in which USAC might be justified in going after an applicant alone. For example, if USAC had substantial, credible evidence to show that it could never succeed in recovering anything from the service provider, it “might” be reasonable to look to the applicant to repay the entire debt.

Clearly, though, that is not the case here. Here, the party that has yet to pay anything is a company whose name is synonymous around the world with wealth and success and its prospects for the future look as bright or perhaps even brighter than ever. We cannot even begin to imagine, therefore, how it could be anything but unjust, unfair, unreasonable, inequitable, and counter to the public’s best interest to hold the School District’s feet to the fire to force it to pay back to the E-rate program the hundreds of thousands of dollars that the company rightly owes.

Insofar as the justification for waiver is concerned, another important thing to keep in mind is the economic ripple effect that will occur if USAC has no choice but to enforce joint debts entirely against applicants. If USAC goes solely after applicants in joint liability situations like the instant one and is successful, those applicants, in turn,

will have no choice but to go after their service providers for contribution. That is a very expensive proposition. To obtain those contributions, applicants will likely have to expend considerable time and money litigating against their service providers. Many schools and libraries will not be able to afford that kind of activity, and a stubborn service provider with deep pockets could conceivably keep a school or library tied up in a nasty legal battle for years. More likely than not, numerous applicants would wind up eating the entire amount. What is apparent, therefore, is that in most if not all circumstances, going after an applicant for more than half of the parties' joint liability would do much more harm than good.

No doubt IBM is going to ask the Commission to review USAC's Decision on Appeal. That much is virtually certain. When that occurs, USAC will suspend any further collection activities against both IBM and the School District pending the outcome of the Request for Review. That will narrow the time frame of the School District's problem down to the period before IBM submits its appeal and after the Commission's decides the case, assuming it upholds USAC's decision. While the appeal is pending for months or even years, however, the School District is going to have to live with the uncertainty -- if the Commission decides not to grant the School District's request for waiver now.

The reason why USAC is going after the School District for the balance of the parties' joint liability today and why it will resume that activity if and when the Commission affirms USAC's decision is because, according to USAC, it has no authority to let the School District "off the hook," no matter how compelling the circumstances may be. That is why the School District, which did everything it possibly could in 2007 to put this matter behind it, needs the Commission's protection now and why a waiver is so important to it.

Because the particular facts in this case clearly warrant a waiver, the School District respectfully requests that the Commission waive its rules and release the School District from any further liability in connection with FRN 648960.

B. SUSPENDING COLLECTION ACTIVITY AGAINST THE SCHOOL DISTRICT IS AN ALTERNATIVE SOLUTION

The School District understands that a waiver might not be possible. Hopefully that will not be the case, but if it is, the School District urges the Commission to adopt the solution described below in Section IV as an alternative to waiver. In short, the solution the School District is proposing involves the Commission simply allowing USAC to stay its collection activities against the School District and instead instructing USAC to focus its collection efforts on IBM, which has yet to pay its share of the parties' joint liability. The strength of this solution is that it is pragmatic and simple and, at the end of the day, ought to achieve the same result as a waiver, albeit without the accelerated, clear-cut finality and security that *only* a waiver can provide.

IV. RELIEF SOUGHT

The School District respectfully requests that the Commission grant the requested waiver and release the School District from any further liability in connection with FRN 648960.

Alternatively, the School District respectfully requests that the Commission instruct USAC to: (1) suspend immediately any further collection activities against the School District in connection with FRN 648960; (2) continue its collection activities against IBM; and (3) resume collection activities against the School District *only if and when* the Commission has exhausted all of its administrative and legal enforcement options against IBM, and it still cannot collect the \$421,787 that the corporation owes.

Respectfully submitted
on behalf of El Paso Independent School District,

/s/ John D. Harrington

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